United States Court of Appeals

for the Second Circuit

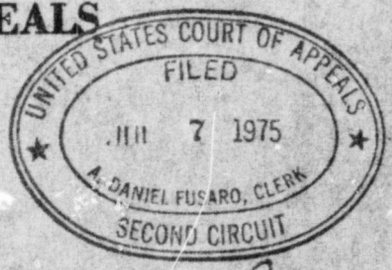
APPELLEE'S BRIEF

75-7346

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Plaintiff-Appellant,

- against -

SAGE REALTY CORP., THE WILLIAM KAUFMAN ORGANIZATION, ROBERT KAUFMAN, MELVYN KAUFMAN, ALLIED MAINTENANCE CORP., PRUDENTIAL BUILDING MAINTENANCE CORP., LOUIS FEIL and WILLIAM KAUFMAN,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CERTAIN APPELLEES

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UNITED STATES COURT OF APPEALS
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LOCAL 32B, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, : Docket No. 75-7346

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Defendants-Appellees.

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BRIEF FOR APPELLEES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented in this Court for review in connection with the appeal herein:

1. Whether the District Court properly denied plaintiff-appellant s motion for a preliminary injunction restraining defendants-appellees from committing alleged violations of certain provisions of a collective bargaining agreement between plaintiff-appellant and a multi-employer association, where plaintiff failed

to demonstrate that defendants-appellees are or ever were members of the multi-employer association or signatories to or otherwise bound by the provisions of the collective bargaining agreement?

2. Whether a preliminary injunction may properly be granted where the purpose and effect of such extraordinary relief would be to require compliance with contractual provisions violative of public policy as expressed in Section 8(e) of the National Labor Relations Act?

STATEMENT OF THE CASE

This is an appeal by plaintiff-appellant Local 32B, Service Employees International Union, AFL-CIO, from an order of the United States District Court for the Southern District of New York (Gagliardi, J.), denying plaintiff's motion for a preliminary injunction.

The action was commenced by plaintiff's filing of a complaint on May 28, 1975. Named as defendants were Sage Realty Corp. ("Sage"), William Kaufman Organization, Robert Kaufman, Melvyn Kaufman, Allied Maintenance Corp., ("Allied") and Prudential Building Maintenance Corp. ("Prudential").

Plaintiff is alleged to be a labor organization representing certain building service and maintenance workers who were employed at premises located at 77 Water Street and 127 John Street, New York, New York, on the date of the complaint (Comp. ¶3).

The complaint alleges that defendant Sage, on or about April 24, 1975, sent a notice to Allied and Prudential terminating their respective contracts for building and maintenance services, effective May 31, 1975, at the aforementioned premises. The complaint further alleges that the defendants, other than Allied and Prudential, have violated certain provisions of the 1975 Commercial Building Agreement (the "1975 Agreement") between Realty Advisory Board on Labor Relations, Incorporated (the "RAB") and plaintiff by, among other things, failing to comply with the contracting of work provisions thereof, failing to arrange for or offer employment to the work force at such premises and failing to follow the grievance procedures provided by the 1975 Agreement (Comp. ¶15).

It is alleged that defendants are bound by the terms of the 1975 Agreement by reason of their alleged membership in the RAB (Comp. ¶1) and that the 1975 Agreement was negotiated and concluded between plaintiff and defendants, as members of the RAB, while defendants were members of the RAB (Comp. ¶13).

The relief sought by the complaint is a permanent injunction to compel defendants to proceed to arbitration of disputes alleged to arise under the 1975 Agreement and restraining defendants, pending such arbitration, from dismissing any building service or maintenance workers employed at the subject premises or engaging any building service or maintenance contractor unless and until such contractor employs such workers upon the terms and conditions set forth in the 1975 Agreement (Comp. pp. 9-10). The complaint also seeks a preliminary injunction providing precisely the same relief. (id.).

On May 29, 1975, plaintiff made application to Judge Thomas P. Griesa of the District Court for a temporary restraining order on the same terms as the preliminary and permanent injunctions sought by the complaint. Judge Griesa declined to issue such an order, reserved decision on the matter and thereafter advised the parties that Judge Gagliardi would hear the application de novo.

On May 30, 1975, at a de novo evidentiary hearing, plaintiff moved to amend the complaint to add William Kaufman and Louis Feil as additional defendants, which motion was granted by Judge Gagliardi.* Additional eviden-

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* No amended complaint naming such additional defendants has been served and filed.

tiary hearings were held before Judge Gagliardi on June 5 and June 6, 1975.

By memorandum decision, dated June 13, 1975, Judge Gagliardi denied plaintiff's motion for a preliminary injunction. Judge Gagliardi concluded that plaintiff had not met its burden of showing, and there appeared to be "little or no likelihood that plaintiff might ultimately establish", that defendants were bound by the 1975 Agreement by reason of their alleged membership in the RAB (Mem. Dec. p. 5).

By notice of appeal, dated June 13, 1975 and filed June 16, 1975, plaintiff appealed from the order of the District Court. On June 16, 1975, a temporary restraining order pending hearing and determination of plaintiff's motion for a preliminary injunction pending appeal was signed by Judge Murray I. Gurfein of this Court.

On June 17, 1975, argument on plaintiff's application for a preliminary injunction pending appeal was heard before this Court. On June 18, 1975, in a per curiam decision, the defendants were restrained from treating as permanent the contractual arrangements with Monahan Commercial Cleaners, Inc. ("Monahan"), defendants' present building cleaning and maintenance contractor, plaintiff's application was in all other respects denied and this appeal was set down on an expedited basis.

STATEMENT OF FACTS

A. Background Facts

This dispute focuses upon two commercial buildings located at 77 Water Street and 127 John Street in New York City. Said premises are owned by certain of the individual defendants in this action (Tr. 40-41).

Prior to September 1, 1974 each of these premises was actively managed by Cushman & Wakefield, Inc. ("C & W") pursuant to a contractual arrangement (Exh. G) with Sage and the respective owners (Tr. 43, 276). Effective September 1, 1974, C & W's contract was concluded and Sage began active management at each of these premises (Tr. 43).

B. The Independent Cleaning Contractors

Since their opening in 1970 or 1971, building cleaning and maintenance services were provided at each of these premises by independent commercial cleaning contractors (Tr. 44, 289). Neither C & W nor Sage ever employed cleaning workers at these premises (Tr. 44, 276-277, 289). At all relevant times prior to June 1, 1975, Allied and Prudential were the independent commercial cleaning contractors at these premises. On or about April 29, 1975, each of Allied and Prudential was notified by Sage that its contract would

terminate on May 31, 1975, pursuant to its terms (Exh. F and G to Sweeney Aff.). On June 1, 1975, Monahan became the present independent commercial cleaning contractor at each of these locations (Tr. 45).

Plaintiff union had separate collective bargaining agreements with each of Allied and Prudential covering the cleaning workers at these premises (Tr. 73-74). Monahan has no collective bargaining relationship with plaintiff union but rather has a contract for its employees wherein Local 803, Teamsters, is the recognized bargaining agent (Tr. 300-301).

C. The Present Dispute

On or about May 5, 1975, plaintiff union was notified that the contracts of each of Allied and Prudential would expire on May 31, 1975. Thereafter, plaintiff union began to assert its claim that defendants* were obligated to cause the new independent commercial cleaning contractor to employ the full work force which had been employed at these locations by Allied and Prudential (Sweeney Aff.).

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* The term "defendants" as used herein, shall refer to all defendants other than Allied and Prudential.

Such work force included 14 cleaning workers allegedly represented by plaintiff union and employed by Prudential at 127 John Street* and 12 cleaning workers allegedly represented by plaintiff union and employed by Allied at 77 Water Street (Tr. 204-206, 250-251). Allied and Prudential are continuing to perform cleaning services in tenant space in these premises, employing part of the work force represented by plaintiff union (Tr. 261-262). Contrary to plaintiff's assertion (Appellant's Br. 29-30) that the workers in question were the employees of C & W and Sage, the record reveals that the workers in question are those persons employed by Allied and Prudential (Tr. 153, 170) who were not offered employment by Monahan in June, 1975.

Plaintiff's contentions concerning defendants' alleged obligations are based upon its erroneous assumption that defendants are parties to and bound by the 1975 Agreement, which assumption was found by the court below to have been unsupported by the evidence. Such assumption in turn is premised upon the equally erroneous assumption that defendants were members of the RAB and made untimely efforts to withdraw therefrom, which assumption was also repudiated

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* Robert Kaufman testified that two receptionist-secretaries employed by C & W at 127 John Street became employees of Sage upon termination of the C & W contract in September 1974. These secretaries subsequently became employees of Prudential (Tr. 307-309).

by the court below.

D. RAB and the 1975 Agreement

In or about October 1974, negotiations commenced between plaintiff union and the RAB, a multi-employer association which purports to negotiate collective bargaining agreements on behalf of its members (Tr. 37). On January 2, 1975, such negotiations were successfully concluded by the execution of the 1975 Agreement, which became the collective bargaining agreement in effect between the members of the RAB and plaintiff union (Tr. 37).

The certificate of incorporation, constitution and by-laws of the RAB (Def. Exh. F) contain express provisions governing membership. These documents establish that the RAB consists of "memberships", each of which "must be on behalf of either a residential or a commercial building in New York City." Thus, Article VI of the certificate of incorporation states, in pertinent part, that

> "The Corporation shall consist of Residential Building Memberships, and Commercial Building Memberships. Every application for membership must be on behalf of either a residential or a commercial building in New York City, and must designate the person who will become the member of the Corporation to act for and represent such membership as its agent, in the affairs of the Corporation." (emphasis added) (see also Constitution, Art. II).

The certificate of incorporation and constitution therefore require that in order to obtain membership there must be an application and that the application is "on behalf" of the "building".

Similarly, Section 14 of the by-laws of the RAB (Def. Exh. F) provides, in pertinent part, that

> "Any person, firm, association or corporation desiring to obtain a membership or memberships, for one or more buildings owned or operated in the City of New York, shall apply therefor in writing to the Secretary. The Secretary shall thereupon submit the application for approval to the next meeting of the Board . . ." (emphasis added).

None of the defendants ever submitted an application for membership in the RAB (Tr. 263). C & W executed defendants' Exhibits D and E, which were identified by Sue Everingham of the RAB as the only applications for membership contained in the files of the RAB pertaining to 77 Water Street and 127 John Street (Tr. 265). Significantly, neither Exhibit D nor E refers in any way to any of the defendants but only to C & W and the respective buildings. On the basis of this and other testimony, the district court properly concluded that

> "There is no proof that C&W had any authority as agents to apply for membership in the RAB on behalf of the defendants. Moreover, there is no proof that either C&W or any of the defendants intended

> the applications to be made on defendants' behalf" (Mem. Dec. 4).

Kenneth A. Shearer, Senior Vice President of C & W, testified that C & W signed "assents" to the RAB contract for every building it manages in which it has its own employees (Tr. 275-276), and that C & W did not sign assents for buildings in which it did not have its own employees absent specific authorization from the owner (Tr. 280) and in those instances where an owner might have employees, such authorization was sought. Mr. Shearer also testified that C & W did not advise the owners of 77 Water Street and 127 John Street that it had filed applications for membership in the RAB with respect to these buildings (Tr. 278). On the basis of this and other testimony, the district court properly concluded that

> "The evidence . . . is that C&W applied for membership in the RAB solely in its own behalf as employers and as operators of the buildings at 127 John [Street] and 77 Water [Street]" (Mem. Dec. 3-4).

The conclusion of the court below is also supported by the assents to the 1972 RAB contract executed by C & W (Pl. Exh. 3 and 6).* Such assents expressly state that

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* Significantly, plaintiff's contract director testified that plaintiff did not possess any written "assent" to the 1975 Agreement "by anyone on behalf of anybody dealing with 77 Water Street or 127 John Street" (Tr. 74). In addition, plaintiff's attempt to infer that C & W's execution of these Exhibits was on behalf of defendants (Appellant's Br. 19) is erroneous, as found by the court below. As C & W did not sign collective bargaining agreements with plaintiff, but signed "assents" thereto, Kenneth Shearer's testimony is wholly consistent with the findings below.

"Cushfield Maintenance Corp." (a subsidiary of C & W) is the "Employer". Although "William Kaufman Organization" is identified for informational purposes as the owner of the respective premises, the assents are not signed by or on behalf of William Kaufman Organization (or any other defendant). In addition, as testified to by Mr. Shearer, the assent form is completed by the RAB and C & W adds no data other than its signature (Tr. 285). In fact, none of the defendants ever saw the assents signed by C & W prior to the trial herein.

The conclusion that none of the defendants were ever members of the RAB is also supported by evidence concerning actions taken by or on behalf of plaintiff -- actions which cannot be interpreted as anything other than admissions of defendants' non-membership in the RAB. Kevin McCulloch, contract director of plaintiff, sent a letter (Def. Exh. C) dated January 9, 1975, addressed to Sage, asking that Sage institute the wage increases provided for in the 1975 Agreement, and stating that

> "By complying with this request we will feel confident of your willingness to enter into a new agreement with us on the same basis as the Realty Advisory Board Agreement to cover the employees in the above building."

Moreover, Mr. McCulloch admitted in his testimony that this letter was of the type sent to independent owners and agents, rather than RAB members (Tr. 69, 76). He also admitted having

received a letter signed by Melvyn Kaufman, on behalf of Sage, dated March 5, 1975 (Pl. Exh. 13), in which Kaufman stated that Sage would make payments to employees in accordance with wage scales described in McCulloch's January 9 letter (Def. Exh. C) "without prejudice", and that

> "inasmuch as we are not members of the Realty Advisory Board, and inasmuch as we have not seen the final agreement, we will not make any further commitment."

McCulloch further testified that he knew that the March 5 letter of Sage, signed by Melvyn Kaufman, was consistent with McCulloch's January 9 letter, which was only sent to non-members of the RAB (Tr. 77).

Plaintiff sought in the court below to utilize the RAB letter to Melvyn Kaufman of January 23, 1975 (Exh. D to Sweeney Aff.), in reply to a letter, dated January 21, 1975, from Sage, as an indication of defendants' "resignation" and untimely withdrawal from membership in the RAB. However, the unilateral and erroneous characterization of Sage's letter of January 21, 1975 (Def. Exh. A) as a withdrawal from membership in the RAB is patently obvious both by a review of said letter and the testimony of Sue Everingham of the RAB as to the circumstances giving rise

to the purported replacement of the C & W membership in the RAB by alleged RAB membership for Sage upon the latter s becoming managing agent for the two buildings (Tr. 25, 30-31; Mem. Dec. 4).

On January 21, 1975, Sage advised the RAB that ". . . you are in error. We are not now nor do we intend to be members of the [RAB]. . ." This is the letter which was characterized by plaintiff as a resignation from the RAB (Def. Exh. A). The basis for such characterization, however, was simply an "assumption" by the RAB bookkeeper as to the intent of Sage (Tr. 25). The record before the district court totally refuted such an assumption.

Plaintiff further sought to demonstrate to the court below defendants' membership in the RAB by reason of the payment by Sage of two semi-annual $30 RAB dues invoices covering the period September 1, 1974 through March 31, 1975 (Def. Exh. H and I). Albert Braunstein, controller for Sage, testified in detail concerning the payment of these invoices (Tr. 316-318). Prior to Sage becoming managing agent at the two buildings on September 1, 1974, Sage and C&W developed a procedure for handling bills received after August 25th -- the usual cut-off date of C & W for payment of monthly bills. C & W received these bills after said date, marked them in their usual and customary

manner as approved for payment and forwarded them, together with perhaps a dozen or more other bills similarly received, to Sage. Having been received in the normal course from C & W and bearing the C & W approval stamps, each of such bills was paid as a routine matter by the disbursing department of Sage. The court below properly found that such payments by Sage were inadvertent and concluded that, other than such inadvertent payment,

> "there is no evidence of [defendants'] membership [in the RAB]; to the contrary, defendants' actions and conduct have been consistent with non-membership" (Mem. Dec. 4).

ARGUMENT

I

THE COURT BELOW DID NOT ERR IN SUSTAINING DEFENDANTS' CONTENTION THAT THEY HAVE NEVER BEEN MEMBERS OF THE RAB OR PARTIES TO OR BOUND BY THE 1975 AGREEMENT

It is a well-established principle that the duty to arbitrate is of contractual origin and that no person can be compelled to arbitrate a dispute unless required by a written agreement to do so. See, e.g., John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); 9 U.S.C. §4. As is shown below, defendants were not parties to or otherwise bound by the 1975 Agreement (pursuant to which plaintiff purports to seek arbitration) under any of the theories advanced by plaintiff here and in the court below.

A. Defendants Have Never Belonged to the RAB and Have Never Assented to the 1975 Agreement.

Defendants contended below and the District Court found that neither the actions of defendants nor of C & W gave rise to membership in the RAB on behalf of defendants so as to bind them to the provisions of the 1975 Agreement. There was ample evidence to support that finding.

1. Defendants Were Not Members of the RAB in Their Own Right or Signatories to the 1975 Agreement.

Plaintiff has never contended that there exists any written agreement between plaintiff and any of the defendants which was signed by or expressly consented to by any of the defendants. In fact, in his testimony below, plaintiff's contract director, Kevin McCulloch, expressly admitted that plaintiff did not possess any written "assent" to the 1975 Agreement "by anyone on behalf of anybody dealing with 77 Water Street or 127 John Street" (Tr. 74). It is therefore clear that defendants can only be bound by the 1975 Agreement by reason of alleged membership in the RAB. However, the evidence before the court below clearly established that the certificate of incorporation, constitution and by-laws of the RAB (Def. Exh. F) all expressly required the submission of an application in order to obtain RAB membership, and that none of the defendants ever submitted an application for membership (Tr. 263) nor ever sought membership in any other manner. The conclusion is therefore inescapable that none of the defendants ever belonged to the RAB and that none ever assented to the 1975 Agreement.*

*Plaintiff in effect concedes this, since its argument on this appeal is premised solely on Cushman & Wakefield's membership in the RAB (Point I of Appellant's Br., at 12 et seq.).

2. Defendants Were Not Members of the RAB Nor Bound by the 1975 Agreement by Reason of Actions of Cushman & Wakefield

The court below, on the basis of the evidence adduced at the hearing, made specific findings of fact that "C & W applied for membership in the RAB solely in its own behalf as employers and as operators of the buildings at 127 John [Street] and 77 Water [Street]", and that there was "no proof that either C & W or any of the defendants intended the applications to be made on defendants' behalf" (Mem. Dec. 3-4). Nevertheless, plaintiff contends here, as it did below, that C & W joined RAB "as agents of" the defendants, thereby making the C & W membership "binding" upon defendants (Appellant's Br. 12). However, plaintiff's theory of agency is premised upon errors both of fact and law, and the court below correctly decided that such theory was without merit.

The most striking flaw in plaintiff's theory is its erroneous assertion that C & W in its transactions with the RAB acted in a capacity as agent for a purportedly disclosed principal, namely defendant Sage (Appellant's Br. 20, 21, 31). The fact is, however, that neither of C & W's membership applications (Def. Exh. D and E) made any mention of the building owner, and neither bears any signature containing the words "as agent" or words of similar

import. The only reference to C & W as an agent appears in a schedule of descriptive data at the bottom of the application form, where C & W is merely identified as being the managing agent of the premises.* On the basis of the foregoing facts it is clear that, notwithstanding whether or not C & W had the authority, either actual or apparent, to join the RAB on behalf of defendants, C & W did not act on their behalf but instead acted in its own name and for itself only. This follows not only from the fact (as found by the court below) that "defendants' actions and conduct have been consistent with non-membership [in the RAB]" (Mem. Dec. 4), but also from the ordinary rule of agency which is succinctly set forth in 3 C.J.S. Agency §393, as follows:

> "As a general rule, where an agent executes an instrument or commits an act in his own name with no intention to bind the principal, the principal ordinarily will not be liable thereon,

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* Although C & W's "assents" to the 1972 collective bargaining agreement (Pl. Exh. 3 and 6) do identify the owner of the premises, the owner is not designated as principal and it is clear that the identification of the owner is merely informational. In fact, the record shows that such information is placed on the assent form by the RAB and not the employer (Tr. 285). The "assent" forms clearly identified a C & W subsidiary, and not the owner, as "Employer" of the employees covered by the assent. In any event, it is clear that the 1972 assent does not create membership in the RAB or have any binding effect with respect to the 1975 Agreement.

> even though the agent, in the case of a written instrument, added the word 'agent' to his signature. In order that a principal be found liable, it must be shown that it was the intention of the parties to hold a particular person as principal and that the agent had authority to bind such person, and upon such a showing, the principal will be liable . . . ."

See also Restatement (Second) of Agency §156, Comment b.

Here, not only were the pertinent documents executed by C & W in its own name, but the court below specifically found that "[t]here is no proof that either C & W or any of the defendants intended the applications [for RAB membership] to be made on defendants' behalf" (Mem. Dec. 4). The rule stated in 3 C.J.S. Agency §393, supra, is thus clearly applicable and defendants are not bound by C & W's actions with respect to the RAB.

Restatement (Second) of Agency §14(n) (cited at Appellant's Br. 14), to the effect that a person may be both an agent and an independent contractor, is thus irrelevant, because although C & W was an agent the court below found that it did not act in such capacity in transactions with the RAB.

Because C & W did not act in the capacity of agent, it follows that the question of its authority as such is irrelevant. However, even if it were assumed, arguendo, and contrary to fact, that C & W did purport to act as agent

for defendant Sage in transactions with the RAB, it is clear that such action would have been in excess of C & W's authority, either actual or apparent, and thus not binding on defendants.

Insofar as actual authority is concerned, the record (Tr. 275-280) demonstrates, and the court below expressly found, that "[t]here is no proof that C & W had any authority as agents to apply for membership in the RAB on behalf of the defendants" (Mem. Dec. 4). Moreover, with respect to the question of apparent authority, plaintiff presented no evidence in the court below in support of its present contention (Appellant's Br. 20-22) that C & W had any such authority.* As the Fifth Circuit stated in Bogue Electric Mfg. Co. v. Coconut Grove Bank, 269 F.2d 1 (5th Cir. 1959),

> "The burden of proving agency is on the party asserting it . . . . Whether or not acts are within the scope of an agent's apparent authority is to be determined as a question of fact". 269 F.2d at 4.

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* Plaintiff's failure to adduce any evidence of apparent authority is highlighted by the fact that on this appeal the only matter cited by plaintiff in support of its assertion that such authority existed is a dictum, contained in the per curiam decision on plaintiff's motion for a preliminary injunction pending appeal, to the effect that this Court had been led to believe that there was a practice in the industry of Local 32B - RAB bargaining through managing agents (Appellant's Br. 17, 20). There is absolutely no evidence of any such practice.

See also 9 Wright & Miller, Federal Practice & Procedure §2589 at fn. 66 ("clearly erroneous" rule applicable to findings of existence and scope of an agency).

Plaintiff relies on Matter of Brown, Harris, Stevens, Inc., 59 LRRM 2941 (Sup. Ct. New York County 1965), aff'd, 26 A.D.2d 620 (First Dep't 1966), in order to support its contention that the actions of C&W with respect to the RAB were binding on defendants (Appellant's Br. 15). However, the holding of that case was expressly premised on the fact that there the contract between the owner and managing agent specifically made the pertinent employees the employees of the owner, and the assent to the collective bargaining agreement did not identify the managing agent as "employer". Here, however, precisely the opposite is true, because the contract between C&W and Sage (Exh. G) specifically stated that all employees caused to be hired by C&W were to be C&W's and not Sage's employees, and the "assents" -- which were to the 1972 agreement only -- clearly designated a C&W subsidiary as "Employer".

Plaintiff attempts to avoid this clear distinction by citing Restatement (Second) of Agency §14(n), which states that an agent can also be an independent contractor. Plaintiff thus misconstrues the question, since §14(n) has nothing whatever to do with the question as to whether the employees

of a managing agent are necessarily engaged on behalf of a building owner as principal. More in point is Comment e to Restatement (Second) of Agency §5(2), which states, in pertinent part, that

> "In no case are the servants of a non-servant [i.e., independent contractor] agent the servants of the principal".

Moreover, it must be emphasized that the employees ostensibly involved in this case are not the former employees of C&W, but the employees or former employ es of Allied and Prudential, the independent building service and maintenance contractors formerly engaged at the premises in question.

3. Defendants Never Were Members of the RAB and Therefore There is no Issue of Untimely Withdrawal Here

Plaintiff erroneously seeks to characterize this action as a case of untimely withdrawal from a multi-employer association (Appellant's Br. 15-18). No such issue is involved here, because plaintiff failed in the court below to demonstrate in the first instance that defendants ever were members of the RAB. As noted by Judge Gagliardi in his decision,

> "Defendants contend that they are not now nor ever were members of the RAB and, therefore,

> not bound by the [collective bargaining] Agreement. For the reasons set forth . . . , the court agrees with defendants' contention" (Mem. Dec. 2).

While the doctrine of Retail Associates, Inc., 120 NLRB 388 (1958), and its progeny may govern cases of purported withdrawal from an association, it is plainly inapplicable in these circumstances where defendants never were members of a multi-employer association.

Plaintiff's citation (Appellant's Br. 33) of Pharmacists Union v. Lake Hill Drug Co., 55 LRRM 2844 (1964), which involved the effectiveness of employer association by-laws as against the union in an untimely withdrawal situation, is similarly inappropriate. Defendants do not dispute that sound labor policy may require that, in the case of withdrawal, an employer not be permitted to utilize self-serving by-law provisions to await the result of negotiations in order to determine the advantages of continued membership. However, determination of initial membership status presents an entirely different question, and policies designed to prevent employer abuses in withdrawal cases are not applicable to cases such as this where the issue for initial determination was whether or not defendants ever were members of the association.

Since the court below found that defendants had never at any point in time become members, the issue of timeliness of "withdrawal" is simply not involved here.

B. Defendants Are Not Parties to or Bound by the 1975 Agreement by Reason of Their Alleged Status as Successor Employers to Cushman & Wakefield

Plaintiff argues that defendants, other than Allied and Prudential, are successor employers to C & W as Sage, upon termination of C & W's services in September 1974, took over the C & W work force at each of the subject premises. Assuming, arguendo, that defendants are "successor" employers to C & W, defendants cannot be found to have become parties to or otherwise bound by any of the provisions of the 1975 Agreement. NLRB v. Burns Security Services, 406 U.S. 272 (1972).

In Burns, the Supreme Court held that a successor employer does not, simply by virtue of such succession, become bound by the collective bargaining agreement reached by a union and the predecessor employer, in view of the provisions of §8(d) of the National Labor Relations Act, 29 U.S.C. §158(d). 406 U.S. at 281-284. The Court stated that

> "[S]uch a duty [the obligation of the collective bargaining agreement] does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor . . ." 406 U.S. at 291.

Although plaintiff relies on John Wiley & Sons v.

Livingston, 376 U.S. 543 (1964), for the proposition that defendants can be compelled to arbitrate the present dispute as a successor employer, such reliance is misplaced. In Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249 (1974), an action brought under §301 of the Labor Management Relations Act to compel arbitration, the Supreme Court reviewed Wiley and its progeny and concluded that, in the circumstances of that case, Wiley did not require a successor employer to arbitrate.

As the Supreme Court noted in Howard Johnson, supra,

> "the question whether [the employer] is a 'successor' is simply not meaningful in the abstract . . . the real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative . . . There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." 417 U.S. at 262 n. 9.

In Howard Johnson a union sought arbitration on behalf of employees who were not hired and did not become employees of the alleged successor. There, as in the present case, the union sought to circumvent the holding in Burns by asserting its claim in the context of a §301 suit to compel arbitration rather than in an unfair labor practice context,

as in Burns. The Court did not permit such circumvention. 417 U.S. at 262.

Wiley involved a statutory merger of two companies and, as noted by the Supreme Court in Howard Johnson, its holding was properly cautious and narrow in limiting Wiley to the circumstances peculiar to the merger context. 417 U.S. at 254. As the merger in Wiley was conducted "against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation" (Burns, 406 U.S. at 286), the duty "to arbitrate under its predecessor's collective bargaining agreement may have been fairly within the reasonable expectations of the parties" (Howard Johnson, 417 U.S. at 257). In addition, as noted in Howard Johnson, with the disappearance by merger of the predecessor employer in Wiley, no other party would be available to enforce the obligations voluntarily undertaken by the merged corporation.

In the instant case, plaintiff union seeks to hold defendants to contractual provisions in the 1975 Agreement never assumed by them. As was the case in Howard Johnson, and not withstanding defendants' alleged successorship status, the Wiley argument is inapplicable and this Court cannot compel arbitration of contractual provisions not binding upon defendants.

In Howard Johnson, the Supreme Court determined that arbitration was not required as the subject employees of the predecessor were not hired and never became employees of the successor. Thus, a §301 action to compel arbitration could not become "back-door" relief to avoid the clear holding in Burns that a successor does not become bound to the predecessor's collective bargaining agreement.

Moreover, in the instant case, although plaintiff attempts to portray C & W and thereafter Sage as having employed those employees who are the subject of this dispute (Appellant's Br. 29-30), such misleading efforts are unsupported by the record. C & W did not employ those union members who are the object of plaintiff's alleged concern. Those workers were employees of Allied and Prudential, the prior building and cleaning maintenance contractors, with whom C & W had entered into service contracts (Tr. 276 - 277). Indeed, if defendants were arguably "successor" employers to C & W, they cannot be found to be the "successor" employer of those employees upon whom this dispute is focused. As in Howard Johnson, the plaintiff's attempt to bind defendants to a contract must be denied.

If defendants were arguably "successor" employers to C & W, and even if it were determined that defendants had obligations under a collective bargaining agreement, the

only collective bargaining agreement to which defendants may have any successorship obligations is the 1972 Commercial Building Agreement (the "1972 Agreement") between plaintiff and the RAB (Pl. Exh. 10). Unlike Wiley, the dispute in question focuses upon events occurring after the expiration of the relevant collective bargaining agreement and under a new agreement reached by other parties - not even the predecessor. Arbitration cannot be compelled under such circumstances.

On September 1, 1974, the date that Sage replaced C & W as managing agent for these premises, the only collective bargaining agreement in existence was the 1972 Agreement and negotiations for a new agreement had not commenced. The 1972 Agreement expired by its terms on December 31, 1974. At the time that the dispute between plaintiff and defendants arose, the 1975 Agreement was in effect. Indeed, plaintiff alleges that it is the breach of the 1975 Agreement that gives rise to their purported injury and prayer for equitable relief (Comp. ¶¶ 1, 13, 14 and 15).

Plaintiff, to succeed in this action, must demonstrate that defendants are obligated under the 1975 Agreement. The 1975 Agreement was negotiated between plaintiff and the RAB and has never been expressly or impliedly assumed by defendants. The membership of C & W in the RAB was, as

found by the court below and as is discussed supra, "solely in its own behalf as employers and as operators" of the premises. There is no automatic assumption of such membership by a successor employer. All State Factors, 205 NLRB No. 131 (1973). In All State, a successor employer to a predecessor who had bargained through a multi-employer association was found not to be bound by the provisions of its predecessor's collective bargaining agreement.

C. Defendants are Not Parties to or Bound by the 1975 Agreement by Reason of their Alleged Status as Joint Employers with Cushman & Wakefield

Plaintiff argues that defendants, other than Allied and Prudential, were joint employers with C & W with respect to the work force employed by C & W at these premises. Plaintiff cites Greyhound Corp., 153 NLRB No. 118, 59 LRRM 1665 (1965) as authority for this proposition and asserts that the contract between Sage and C & W (Def. Exh. G) provides full support for this finding (Appellant's Br. 31).

In Greyhound, supra, the record before the National Labor Relations Board clearly revealed that Greyhound had participated actively in the direct supervision of the employees of its cleaning and maintenance contractor. Greyhound was found to have established work schedules for such employees, determined the number of employees required to meet such schedules, given work instructions and prompted discharge of such employees. Accordingly, a joint employer status with the contractor was found. No such necessary factual determinations of such supervision are cited by plaintiff nor can any be found in the record in this action. Instead, and in sole support of this theory, plaintiff relies upon a general contractual retention of the right

to "control" -- not to be confused with control in fact -- by Sage over C & W with respect to certain services to be performed by C & W.

It is defendants' position that they are not joint employers with C & W and that the necessary factual findings to support such theory cannot be and have not been made. Plaintiff has simply failed to prove its case.

Moreover, assuming, arguendo, that defendants were joint employers with C & W, it is clear that such joint employment relationship terminated in September 1974 upon the termination of C & W's services. As discussed above, there can be no showing by plaintiff that, by reason of such relationship, defendants are bound to the 1975 Agreement (the contract under which this dispute arises) as distinguished from the 1972 Agreement. In addition, such relationship cannot relate to the cleaning workers who are the subject of this dispute as they were not employees of C & W or impose upon defendants the membership in RAB obtained by C & W.

D. Defendants Are Not Parties to or Bound by the 1975 Agreement by Reason of the Alleged "Membership" of the Buildings in the RAB

Tacitly recognizing its insuperable difficulties in

directly imposing personal contractual obligations under the 1975 Agreement on any of the defendants, plaintiff seeks to escape that dilemma by an argument based on a disingenuous variation of the familiar theme of the quasi in rem action. Plaintiff's argument is, in effect, that notwithstanding whether or not any of the defendants have any contractual obligations under the 1975 Agreement, they nevertheless are bound by that 1975 Agreement by reason of the buildings' alleged "membership" in the RAB. Thus plaintiff states that

> "In any event, and under any theory of law, it is submitted that the contract is in effect by reason of the buildings' membership in the RAB at the critical time" (emphasis added) (Appellant's Br. 31).

Plaintiff's inability to specify the particular "theory of law" under which this peculiar form of in rem liability exists is clearly indicative of the fact that there is no recognized or acceptable theory which would support that result.

In practical terms, plaintiff's argument is that once anyone having any connection with a building becomes a member of the RAB, all other persons having any connection with that building at that and subsequent times and until notice of termination of the building's "membership" are bound by contracts negotiated by the RAB, merely because the RAB structures its membership records in terms of "buildings" rather than "persons".

Although the primitive notions underlying plaintiff's theory may have had some vitality in the early epochs of the law,* it is evident that it would not make sense and would be unacceptable to apply the modern principles governing the obligations of members of multi-employer associations to an organization facetiously said to be composed of "buildings".

*Cf. Holmes, The Common Law, Lecture I, "Early Forms of Liability", pp. 5-33 (rev. ed. 1963).

II

A PRELIMINARY INJUNCTION MAY NOT BE GRANTED WHERE THE RELIEF SOUGHT IS CONTRARY TO PUBLIC POLICY AS EXPRESSED IN SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT

A. The Provisions of the 1975 Agreement Alleged to Have Been Breached by Defendants Are "Hot Cargo" Clauses Violative of Section 8(e) of the National Labor Relations Act.

The dispute sought to be arbitrated by plaintiff focuses upon its claim that Monahan, the present independent building cleaning and maintenance contractor at the premises, be required to assume in writing the terms and conditions of the 1975 Agreement and employ those building service and cleaning workers represented by plaintiff and formerly employed by Allied and Prudential. Plaintiff would have no dispute with defendants had Monahan become party to the 1975 Agreement and employed the predecessors' work forces.

Plaintiff argues that the replacement of Allied and Prudential by Monahan and the employment by Monahan of its own work force constitutes a violation by defendants of the contracting of work provisions contained in Article I of the 1975 Agreement (Comp. ¶15). Article I of the 1975 Agreement provides, in pertinent part, as follows:

> "2. The Employer shall not make any agreement or arrangement for the performance of work and/or for the categories of work heretofore per-

> formed by employees covered by this agreement except within the provisions and limitations set forth below.
>
> "4. The Employer shall require the contractor to assume this agreement and file a sub-assent hereto with the Union through the R.A.B. and the contractor shall have all the rights and obligations of the Employer hereunder . . . The Employer agrees that employees then engaged in the work which is contracted out shall become employees of the initial contractor or any successor contractor . . ." (Pl. Exh. 11, pp. 6-7).

Such restrictions are void and unenforcible as illegal "hot cargo" clauses within the meaning of Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e). Section 8(e) provides, in pertinent part, as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into . . . containing such an agreement shall be to such extent unenforcible and void . . ."

In Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968), the Third Circuit described the essence of a proscribed "hot cargo" agreement as one which "applies pressure on an employer, directly or indirectly, to require him to cease doing business with a third party in order to persuade the third party to accede to the union's objectives. Its focus, therefore, is on the effect

of the agreement upon the relationship of the employer who is a party to the collective bargaining agreement with an outside employer." 382 F.2d at 440.

The scope of the prohibition of §8(e) is not to be found in the literal meaning of its broad language, but rather in its history and the circumstances out of which it arose. If the object of the agreement is to benefit the employees of the bargaining unit represented by the union, such object is "primary" and does not fall with the proscription of §8(e). However, where the object is the application of pressure on an outside employer in order to require him to accede to union objectives, it is "secondary" and within the prohibition of §8(e). See A. Duie Pyle, Inc. v. NLRB, 383 F.2d 772 (3d Cir. 1967), cert. denied, 390 U.S. 905 (1968).

In National Woodwork Mfrs. Ass'n. v. NLRB, 386 U.S. 612 (1967), the Supreme Court recognized that §8(e) is not directed at union activity which is solely primary in object. The test of legality under §8(e) is

> "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere." 386 U.S. at 644.

As stated by the Supreme Court in National Woodwork,

> "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." 386 U.S. at 645

In the instant case, it cannot be disputed that the employees who are the subject of plaintiff's grievance are and always have been the employees of independent contractors engaged by the defendants. The record is clear that the workers which plaintiff desires the defendants to retain are those persons formerly employed by Allied and Prudential (Tr. pp. 153 and 170) and that neither any of the defendants nor C&W ever employed building cleaning and service workers. (Tr. pp. 43, 44 and 277). From the time that the premises in question were opened, defendants contracted with outside contractors to perform all necessary building cleaning and maintenance services. (Tr. p. 289).

Thus, no valid "work preservation" exemption for defendants' own employees can be found to support this illegal "hot cargo" clause. The self-serving statement contained in paragraph 6 of Article I of the 1975 Agreement that "[t]his Article is intended to be a work preservation provision for the employees employed in a particular building" cannot support what, in fact, is proscribed by

§8(e). In this regard, it should be noted that Article I of the 1972 Agreement (Pl. Exh. 10), identical in all other respects to the 1975 Agreement, does not contain such self-serving language. The inference is clear that during negotiations for the 1975 Agreement, some party correctly surmised that Article I contravened public policy and a separability clause was added to Article I of the 1975 Agreement (Pl. Exh. 11, p. 8).

Plaintiff's basic contention in this action can be reduced to an assertion that a building, once a "member" of the RAB, represents the measure of the work which the plaintiff union is entitled to "preserve" and thus plaintiff can legally cause all jobs to "run with the land" (at least so long as direct pressure is exerted only against defendants and not against Monahan).* Similar arguments were raised and rejected in Danielson v. Masters, Mates and Pilots (Seatrain Lines), 89 LRRM 2564 (2d Cir. 1975) and NLRB v. National Maritime Union (Commerce Tankers), 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974).

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* In this regard, it should be noted that Appellant's Brief 25, states that a strike by plaintiff-union is in progress at a third building (not the subject of this action) where Monahan replaced another cleaning contractor. Such pressure, to the extent that it interferes with Monahan's operations, is clearly improper.

In t..e maritime cases, this Court was faced with interpretations of §8(e) as they related to "ships". The maritime unions' argument that, once a ship fell into their contractual jurisdiction, any subsequent employer must agree to become a party to such union's contract is strikingly analagous to plaintiff's contentions with respect to "buildings". The fact that pressure was exerted in Seatrain Lines not against the subsequent purchaser, but against the transferor, was not persuasive in exempting otherwise prohibited conduct from the strictures of §8(e).

As in the maritime cases, plaintiff's attempt to portray the challenged clauses as legitimate work preservation provisions colorably relates only to employees formerly engaged in the work at the premises. As this Court noted in Seatrain Lines in discussing its Commerce Tankers decision,

> ". . . while recognizing that the challenged contract provision had some elements of 'work preservation' since it merely required continuation of existing union jobs after the ships were sold, we nonetheless concluded that the objective of the clause was to influence the labor relations of a secondary employer, since it required the transferee to use the transferor's union, at least to the extent of manning the transferred vessel. We took into account the accepted distinction between 'union standards' clauses, which are valid, see, e.g., Orange Belt District Council of Painters No. 48 v. NLRB, 328 F.2d 534, 538-39 (D.C. Cir. 1964), and invalid 'union signatory' clauses, which permit the employer to transfer work to other employers only if they

> are under contract with the union, see e.g., NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968), but concluded that the NMU's clause partook more of the attributes of the latter than of the former." Seatrain Lines at 2568

In National Maritime, supra, this Court recognized the distinction between "union standards" and "union signatory" subcontracting clauses.

> "The former, which restrict subcontracting to those who observe certain pay scales and conditions of employment, are valid. Painters District Council 48 v. NLRB, 117 U.S.App.D.C. 233, 328 F.2d 534 (1964); Kennedy v. Sheet Metal Workers Local 108, 289 F.Supp. 65, 78 (C.D.Cal.1968); Teamsters Local 386, 198 N.L.R.B. No. 129 (1972). The latter which permit unit work to be transferred to other employers only if they are under contract with the union, are usually held illegal. NLRB v. Milk Drivers Local 753, 392 F.2d 845 (7th Cir. 1968); NLRB v. Teamsters Joint Council 38, 338 F.2d 23, 28 (9th Cir. 1964); Meat & Highway Drivers Local 710 v. NLRB, 118 U.S. App.D.C. 287, 335 F.2d 709, 717 (1964)." National Maritime at 912.

Section 4 of Article I of the 1974 Agreement is an illegal "union signatory" clause. By its terms, it discriminates against a competing union which may establish similar wage scales and working conditions. It reflects plaintiff's underlying objective, independent of the interests of the employees it represents, to preserve to itself all building cleaning and maintenance service work

in New York City. It furthers the organizational ends of plaintiff with respect to other employers. These "objectives elsewhere" are impermissible goals sought to be obtained by an illegal "hot cargo" clause.

As the employees sought to be "protected" by plaintiff are, in fact, not employees of defendants, the objectives sought by plaintiff are even more clearly directed to the plaintiff-union's motivations elsewhere; i.e. the retention of its representative status with another employer (Monahan) with whom it does not have contractual relations.

Article I of the 1975 Agreement further represents a form of impermissible pressure recently invalidated by the Supreme Court. In Connell Construction Co. Inc. v. Plumbers and Steamfitters Local 100, 43 U.S.L.W. 4657 (June 2, 1975), a decision concerning the applicability of the antitrust laws to labor organizations, the Supreme Court reviewed the applicability of Section 8(e) in the context of the construction industry, an industry which enjoys a limited exemption from the strictures of Section 8(e). Nonetheless, the Supreme Court found that Section 8(e) was not designed to permit unions to pressure non-employers in an effort to organize the employees of subcontractors, i.e., organization from the "top-down".

> "Success in exacting agreements from general contractors would also give Local 100 power to control access to the market for . . . subcontracting work. The agreements with general contractors did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that had signed these agreements." 43 LW at 4660.

If plaintiff were able to enforce Article I of the 1975 Agreement, an independent contractor, who has not bargained with plaintiff concerning terms and conditions of employment for his own work force, would be required to become party to the 1975 Agreement. Plaintiff's attempt to unionize "buildings", and not employees, is precisely the type of "top-down" organizational campaign condemned in Connell Construction and in the maritime cases.

As the 1975 Agreement before the Court does not preserve the work of the defendants' own employees, the true intent of the union in this action and under the 1975 Agreement is an unenforcible attempt to perpetuate the dominance of this union in this industry and to exclude independent contractors whose workers may be represented by other labor organizations. As admitted by counsel for plaintiff union, "we want to maintain the integrity of this location and of the industry." (Tr. 302) This Court should not further these objectives by granting relief contrary to public policy.

B. This Court Cannot Approve a Preliminary Injunction to Enforce the Precise Conduct Made Unlawful by Section 8(e) of the National Labor Relations Act.

Any attempt by an arbitrator to force compliance with the prima facie proscription in the 1975 Agreement prohibiting defendants from engaging an independent contractor who has a collective bargaining relationship with another labor organization cannot be enforced as it would require the commission of an unlawful act and be in excess of the arbitrator's power. See, Botany Industries, Inc. v. New York Joint Board, 375 F.Supp. 485 (S.D.N.Y. 1974), vacated as moot sub nom. Robb v. New York Joint Board, 506 F.2d 1246 (2d Cir. 1974).

As stated by the District Court in McLeod v. American Fed. of Television & Radio Artists, 234 F.Supp. 832 (S.D. N.Y. 1964), aff'd, 351 F.2d 310 (2d Cir. 1965), where a clause is found to violate §8(e).

> "it is unenforcible and void, it should not and cannot form the foundation for any arbitration award, irrespective of the holding of the arbitrator, and the mere submission of the controversy to arbitration would compound the statutory violation." (emphasis added) 234 F.Supp. at 841

Plaintiff relies upon dicta in United Optical Workers v. Sterling Optical Co., 500 F.2d 220 (2d Cir. 1974) in which this Court stated that, were the issue before it, it

would have determined that the question as whether a collective bargaining agreement violates §8(e) is a matter "lying initially in the exclusive province of the arbitrator." 500 F.2d at 224.

In this case, however, as in Seatrain Lines, deferral to arbitration is not appropriate. Where plaintiff's effort to enforce an illegal contract provision itself constitutes a violation of §8(e), the granting of preliminary injunctive relief in furtherance of the very conduct condemned by the "hot cargo" provisions of the National Labor Relations Act is improper.

Furthermore, resort to arbitration may be futile in this instance. The arbitrator's jurisdiction, as in Seatrain Lines, is restricted to "disputes relating to the interpretation, application or performance of any part of this agreement" (emphasis added) (Pl. Exh. 11, p. 15). It is not at all clear that the arbitrator may disregard the plain provisions of the 1975 Agreement. See Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Much as deferral by the National Labor Relations Board under the doctrine established by Collyer Insulated Wire, 192 NLRB 837 (1971), may have been inappropriate in Seatrain Lines, deferral by this Court in the instant case is similarly improper.

> "Deferral is not appropriate in a dispute where the contract provisions governing the dispute are as here unlawful on their face or by their express terms call for a result inconsistent with Board policy under the Act." International Union of Operating Engineers, Local 701, 216 NLRB No. 45, 88 LRRM 1243, 1244 (1975).

Furthermore, even if deferral to arbitration in the instant case were deemed appropriate, it would not follow that the injunctive relief sought by plaintiff union should be granted. By seeking the ancillary injunctive relief claimed to be necessary to plaintiff, plaintiff has necessarily broadened the Court's inquiry. To obtain such relief, plaintiff is required to make a showing of likelihood of success in obtaining and enforcing the award in aid of which such relief is sought. Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974). In Hoh, Judge Friendly wrote as follows:

> "Furthermore, the 'ordinary principles of equity' referred to as a guide in the portion of the Sinclair dissent that was approved in Boys Markets include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 740 (2d Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although courts have been directed by the Steelworkers' Trilogy, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in

> construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit." (emphasis added). 491 F.2d at 561.

In view of plaintiff-union's attempt to impose upon defendants provisions of the 1975 Agreement which do not relate to defendants' own employees, see, National Woodwork, supra, and in view of plaintiff-union's attempt to expand to a new employer with whom it has no bargaining relationship the terms and conditions of the 1975 Agreement, i.e., "top-down organizing", an arbitrator's award upholding the prohibitions of Article I of the 1975 Agreement would be void and unenforcible. Plaintiff by this action seeks to preserve to itself, to the exclusion of all others, building cleaning and maintenance work in the New York City area. Its interest, independent of those of the affected employees, is to further its own organizational goals. No showing of ultimate success can be made by plaintiff as such conduct is prohibited by §8(e).

Accordingly, this Court cannot properly avoid a determination with respect to the unenforcibility of the 1975 Agreement by reason of §8(e).

III

PLAINTIFF HAS FAILED TO DEMONSTRATE THE INADEQUACY OF ITS REMEDY AT LAW, IRREPARABLE INJURY, OR THAT THE BALANCE OF HARDSHIPS FAVORS PLAINTIFF

Comparison of plaintiff's demand for arbitration (Sweeney Aff. Exh. J) and the preliminary injunction sought in the complaint readily discloses that plaintiff seeks by such injunction to secure substantially all the relief it seeks in this action and the arbitration sought to be compelled thereby. The preliminary injunction sought by plaintiff would in effect require defendants to themselves directly hire and supervise the maintenance and service workers heretofore employed by Allied and Prudential, unless Monahan, the new independent contractor hired prior to the commencement of this action, and which already has a labor contract with another labor organization, agreed to hire such workers in accordance with the terms and conditions set forth in the 1975 Agreement.

It is thus clear that the injunction which plaintiff seeks would substantially interfere with the contractual relationship between defendant Sage and Monahan -- a relationship which came into existence well prior to the commencement of this action -- and would cause substantial hardship to defendants. Moreover, it is clear that notwithstanding whether the preliminary injunction sought by

plaintiff is nominally specified as being effective only pending the trial of this action and the arbitration sought to be compelled thereby, that injunction would have the effect of permanently disrupting the present established relationships between defendants and Monahan, and between Monahan and its present employees and the labor organization representing them.

The issuance of such injunction would clearly violate the well-recognized principle delineated by Judge Pollack in Heldman v. United States Lawn Tennis Ass'n, 354 F.Supp. 1241, 1249 (S.D.N.Y. 1973), that

> "The function of a preliminary injunction is to preserve, as best as is possible, the status quo pending a trial on the complaint which will determine if a permanent injunction should issue. It is improper to issue a preliminary injunction where such a grant would effectively provide all the relief sought in the complaint" (emphasis added).

See also, e.g., Knapp v. Walden, 367 F.Supp. 385, 388 (S.D. N.Y. 1973).

Furthermore, it is clear that plaintiff's burden on the issue of balance of hardships and irreparable injury is made very heavy as a result of the substantial identity between the relief sought by the preliminary injunction motion and that sought ultimately by this action. As Judge

Cooper observed in Flood v. Kuhn, 309 F.Supp. 793, 798 (S.D.N.Y. 1970):

> "With regard to plaintiff's burden on the balance of hardships, the need to show irreparable injury is especially present where 'the effect of [a preliminary] injunction is prematurely to give the party seeking it a substantial part of the relief sought in the final judgment'".

Plaintiff relies very heavily on Amalgamated Food Employees Union v. National Tea Co., 346 F.Supp. 875 (W.D. Pa. 1972), in order to sustain its position with respect to the issues of adequacy of the legal remedy, irreparable injury, and balance of hardships. However, the National Tea case is distinguishable in several key respects. First, in National Tea the employees in question clearly were the employees of the defendant, the defendant clearly was a party to a collective bargaining agreement with the plaintiff union, and the court found that "plaintiffs are likely to succeed in their contention that . . . all or some of the claims now made by them are subject to arbitration." 346 F.Supp. at 881. Here, on the contrary, the employees in question are not and never have been the employees of any of the individual defendants or defendant Sage, and the existence of an agreement between those defendants and plaintiff and the right of plaintiff to compel arbitration are the principal issues in dispute. Second, the fact that the

individual defendants and defendant Sage never themselves employed the workers in question has great significance with respect to the question of the harm which would be suffered by defendants if the preliminary injunctive relief sought by plaintiff were to be granted. In National Tea the effect of the injunction was merely to force the defendant to keep open the stores which it had theretofore operated and to continue to employ the workers theretofore employed by it at those stores, or to keep such employees on its payroll if defendant chose not to keep the stores open. Here, on the contrary, the requested injunction would jeopardize the pre-existing relationship between defendants and the present independent cleaning contractor, and would most likely force the individual defendants or defendant Sage to enter the commercial cleaning business on their own behalf by hiring and supervising the employees of their former independent cleaning contractors, Allied and Prudential.

Third, in National Tea the defendant did not enter into a firm agreement for the purported sale of its stores (which sale defendant proferred as the explanation for the closing of such stores) until the day after it had notice of the action commenced by the plaintiff union, and the court found that the defendant had "been engaged in a race against the

law". Here, on the contrary, it is undisputed that the previous independent cleaning contractors were notified of the termination of their contracts in accordance with their terms well prior to the commencement of this action (Comp. ¶15) and defendant Sage entered into a binding contract with Monahan well before this action was commenced. Thus the "status quo" involved in National Tea differs entirely from the facts present here.

Fourth, in National Tea and other cases relied upon by plaintiff, the ostensible "irreparable injury" with which the employees were threatened involved the total loss of their jobs. Here, however, in the court below Monahan expressed a willingness to hire the workers involved (at different sites in New York City) at the usual rates received by Monahan's other union workers (who belong to a different labor organization). It is thus clear that the injury confronting the employees in question is not complete loss of livelihood, but rather, at most, any difference in the wage scales governing members of the different labor organizations. Such difference, if any, could clearly be recovered on behalf of such employees if plaintiff is ultimately successful in this action and any ensuing arbitration.

Finally, although plaintiff has attempted to demonstrate that it has no adequate remedy at law and would suffer irreparable harm, its posture in the present case differs significantly from the actions taken by it in a similar instance involving plaintiff, Monahan and an office building owned by certain of these defendants at 747 Third Avenue, New York, N.Y. (Tr. p. 112). Upon the expiration several months ago of the contract with the independent cleaning contractor at 747 Third Avenue, Monahan was awarded the new cleaning contract. Monahan, having no collective bargaining relationship with plaintiff, used its own employees represented by another union to perform all necessary services.

No demand for arbitration was made by plaintiff in that instance nor did plaintiff seek a temporary restraining order. Instead, plaintiff permitted several weeks to pass before filing charges with the National Labor Relations Board, which agency has determined that the matter be heard before it in accordance with its normal procedures. (Exhibit E to Sweeney Moving Affidavit and Pl. Brief at p. 10). Such resort to customary forums belies any argument of irreparable injury. Plaintiff's own delay in initiating such charges before the National Labor Relations Board further underscores the absence of immediacy so necessary to the issuance of injunctive relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court's order denying the preliminary injunction should be affirmed in all respects.

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